December 2019 Update (No. 247)

Notes from your Updater:

On November 4, 2019, a jury in federal court in Oregon found in favor of ICTSI Oregon, Inc. that the International Longshore and Warehouse Union and Local 8 engaged in unlawful labor practices causing damages in the amount of $93,635,000, with 55% attributable to ILWU and 45% attributable to Local 8.

Oral argument was held in the United States Supreme Court in *Citgo Asphalt Refining Co. v. Frescati Shipping Co.*, No. 18-565, on November 5, 2019, on the issue whether a safe berth clause in a voyage charter party is a guarantee of a ship's safety or a duty of due diligence, and in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260, on the interpretation of the Clean Water Act (pollutants conveyed to navigable waters by a nonpoint source).

The Supreme Court denied certiorari on November 12, 2019, from the decision of the Tenth Circuit in *Rockwood Casualty Insurance Co. v. Director, OWCP*, 917 F.3d 1198 (10th Cir. 2019). The question posed by the carrier was whether regulations promulgated by the Secretary of Labor are exempt from the Administrative Procedure Act so that the Secretary of Labor can issue amended regulations with heightened rebuttal burdens that cannot be met.

The Supreme Court denied Johnny Kirkland's pro se petition for a writ of certiorari on November 25, 2019. Kirkland was seeking to overturn the decision of the Fifth Circuit (April 2019 Update) that affirmed the denial of his dual capacity claims against his employer Ingalls on the ground that he did not allege that he was injured as a result of the negligence of any of Ingalls' vessels.

On the LHWCA Front . . .

From the federal appellate courts:

Shipping and receiving dispatcher who worked at C-Port 1 terminal and was injured at the living quarters of the C-Port 2 terminal was covered under the LHWCA. *Expeditors & Production Service Co. v. Director, OWCP (Spain)*, No. 18-60895 (5th Cir. Nov. 4, 2019) (per curiam).

Opinion

Expeditors hired Garrick Spain to work for Anadarko Petroleum as a shipping and receiving dispatcher at Anadarko's two terminal facilities at Port Fourchon, Louisiana. Spain worked 12 hours per day at C-Port 1, servicing rigs on the outer Continental Shelf, and was on call for the rest of the day, living in a trailer at C-Port 2, located 500 feet from the water and 1.5 miles from C-Port 1. Spain was injured when he slipped in a wet hallway in the living quarters at C-Port 2. Administrative Law Judge Kennington concluded that Spain was covered under the LHWCA, satisfying the situs and status tests, and that he also satisfied the nexus requirement to extraction of natural resources on the OCS for coverage under the Outer Continental Shelf Lands Act. The Benefits Review Board affirmed the conclusions on coverage under both statutes, leading to this appeal to the Fifth Circuit. Agreeing that Spain was covered under the LHWCA, the Fifth Circuit did not address coverage under the OCSLA. As Expeditors conceded that Spain was a maritime employee, the issue was whether C-Port 2 was a covered situs under the LHWCA. Expeditors argued that the living quarters at C-Port 2 were not part of the marine terminal, but the Fifth Circuit noted that the living quarters were within the perimeter fence for that terminal and were not separated from the water by any large buildings. Expeditors next argued that the situs should not be determined from where Spain lived (C-Port 2) but from where he worked (C-Port 1). However, that argument was not responsive to the question whether C-Port 2 was a covered situs. The situs question focuses on where the injury occurred, and that was C-Port 2. Spain was on call when he was at C-Port 2, and the court stated that as long as the employee spends "at least some of [his] time" in covered work, the injury does not have to occur while that employee is actively engaged in the maritime activity (quoting *Northeast Marine Terminal Co. v. Caputo*). All the law required was that the living quarters be part of the terminal. As they were, the Fifth Circuit affirmed coverage under the LHWCA.

Keep filing modifications until you find an ALJ willing to credit your claims. *Star Fire Coals, Inc. v. Director, OWCP (Napier)*, No. 18-3838 (6th Cir. Nov. 4, 2019) (Nalbandian).

Opinion

This Black Lung Benefits Act case presents an important point on modification. Marjorie Napier brought this claim seeking to recover for the death of her husband from coal-dust-induced emphysema. After her claim was denied she sought modification, but that claim was denied by ALJ Phalen. She then filed a second request for modification that was denied by the District Director. Her third modification request was denied by ALJ Sellers. Finally, her fourth modification found ALJ Gee, who found that she established a mistake of fact when Judge Sellers believed the employer's expert over the claimant's expert. The

employer's expert had relied on two textbooks in support of his opinion, but the claimant's expert referenced roughly 20 peer-reviewed articles. The Board and Sixth Circuit held that there was consequently substantial evidence to support Judge Gee's decision that Judge Sellers had made a mistake of fact. The Sixth Circuit concluded: "Mrs. Napier was permitted to request modification at least four times both by asking for nothing more than a reweighing of the evidence and also by presenting new evidence (though not necessarily evidence that wasn't available to her the first time). And, in the end, she found an ALJ willing to credit her claims—albeit backed by substantial evidence as we detail above. But this is what the law requires here."

Fifth Circuit established test to determine whether non-oilfield contracts are maritime and held that a contract to build a concrete rail on a dock in the Mississippi River that required the use of vessels for the construction was a maritime contract and admiralty law applied to the contract in connection with the injury to a marine construction worker. *Barrios v. Centaur, L.L.C.*, No. 18-31203 (5th Cir. Nov. 11, 2019) (Smith).

Opinion

The contractual issues in this case arise from the injury to Devin Barrios, an employee of Centaur, who was injured while offloading a generator from River Ventures' vessel in connection with the construction of a concrete rail by Centaur on United Bulk Terminals' Dock in the Mississippi River. Barrios brought suit against River Ventures and Centaur, resulting in a judgment in favor of Barrios against River Ventures under Section 905(b) of the LHWCA. River Ventures sought indemnity and additional insurance (as a contractor of UBT) from Centaur pursuant to the contract between Centaur and UBT for the construction of the rail. The question was whether the contract was maritime or subject to Louisiana law. In the wake of the decisions of the Supreme Court in *Kirby* and the en banc Fifth Circuit in *Doiron*, Judge Milazzo applied a three-part test (first enunciated by Judge Rosenthal in Texas) to determine if a non-oilfield contract is maritime: did the work performed under the contract involve maritime commerce, did it involve work from a vessel, and did the contract provide or did the parties expect that a vessel would play a substantial role in completing the contract. Applying the first prong of that test, Judge Milazzo held that the contract was a land-based contract so Louisiana law applied and the indemnity and additional insured provisions were invalid under the Louisiana Construction Anti-Indemnity Act. The Fifth Circuit disagreed with the three-prong test applied by Judge Milazzo and adopted the test proffered by River Ventures that in order to determine if a mixed-services contract is maritime, the "contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract." Judge Smith rejected a separate initial test whether the contract involved maritime commerce as that is what the two prongs of *Doiron*, as extrapolated in *Barrios*, were designed to determine. Judge Smith then determined that the test was satisfied in this case as the dock was over the Mississippi River, and the vessels involved in the construction (and the accident) were on navigable waters. The contract also required substantial use of vessels as Centaur's bid expressed that the price for the work was "significantly higher" because of the necessity of vessels in the project, and Centaur's

project manager admitted that the work could not have been done properly without a crane barge. The fact that Centaur's workers, like Barrios, may have performed a majority of their work on the dock did not alter the conclusion that the parties expected a substantial role for vessels in the construction.

Terminal under the LHWCA includes not only structures used for loading and unloading vessels but also those used for receiving, handling, holding, consolidating, and warehousing products. *International-Matex Tank Terminals v. Director, OWCP (Victorian)*, No. 18-60662 (5th Cir. Nov. 25, 2019) (Duncan).

Opinion

Dwayne Victorian was injured while serving as an assistant shift foreman during a tank-to-tank transfer at an oil-and-gas storage facility on the Mississippi River. The facility exists primarily to store oil products in its sixty storage tanks; however, all the product stored at the facility departs by ship, and most arrives by ship also. The claim was tried to Administrative Law Judge Romero, who found that Victorian satisfied the situs and status requirements of the LHWCA and awarded him temporary total disability benefits. The Benefits Review Board agreed that the facility was a "terminal" within the LHWCA and his duties satisfied the status requirement. The Fifth Circuit agreed. Judge Duncan began with the situs requirement, noting that there are geographic and functional components to situs. The employer did not dispute that the facility adjoined the Mississippi River but argued that the location of Victorian's injury was too far from the river to fulfill the geographic component. Judge Duncan disagreed, noting that it is the parcel of land underlying the facility that must adjoin navigable waters and that not every square inch of the area must be used for maritime activity. The functional component of the situs test depended on whether the facility was a "terminal," which is not defined in the LHWCA. Judge Duncan looked to OSHA's definition of a "marine terminal" (as well as the definition that the Supreme Court used in *Caputo*). As the OSHA definition included not only structures used for loading and unloading vessels but also those used for receiving, handling, holding, consolidating, and warehousing products, Judge Duncan held that a mixed-use facility can satisfy the definition of a terminal and need not be analyzed as an "other adjoining area." The Board affirmed the finding of status for Victorian on the basis that a worker may be engaged in maritime employment if he is loading or unloading a vessel at the time of his injury or if his employment as a whole entails loading or unloading of vessels, noting that a worker need only spend "some" time doing maritime work (citing cases involving 2.5% to 5% and 10%). In this case, Victorian monitored the flow of oil products to ensure vessels were loaded and unloaded properly and visited the dock and assisted with loading and unloading daily. Thus, his employment as a whole was an integral party of loading and unloading at the facility. The Fifth Circuit also addressed the employer's contention that maximum medical improvement had been reached so that Victorian should not have been awarded temporary total disability benefits. The argument was premised on the medical opinion that if Victorian chose not to pursue surgery, he had achieved MMI. Victorian did not pursue surgery and undertook conservative treatment for more than eight months before having surgery. Judge Duncan agreed with the Director that there may be a point after which a claimant's unreasonable

delay in electing further treatment leads to de facto MMI, but there was no evidence that the delay in this case was unreasonable, so the finding of TTD was affirmed.

Fifth Circuit affirmed serious OSHA violation for scaffold company's failure to have skiff at jobsite where employees were required to work over water. *Excel Modular Scaffold & Leasing Co. v. Occupational Safety & Health Review Commission*, No. 19-60067 (5th Cir. Nov. 26, 2019) (Higginson).

Opinion

This administrative proceeding arose after an employee of Excel Modular Scaffold was killed when a scaffold he was constructing under a refinery dock on Galveston Bay collapsed into the Bay under the dock and he drowned. OSHA charged Excel with a violation of the regulation that requires the presence of a lifesaving skiff at all jobsites where employees are required to work over water. Excel asserted an infeasibility defense—that it would be difficult for a lifesaving skiff to navigate beneath the dock. However, a skiff could have navigated around other areas of the jobsite and the areas where the employees worked were not solely under the dock. The fact that the employee was killed in an area where the skiff could not navigate did not mean that the employer did not violate the regulation with respect to other areas of the worksite (for example, a worker could have fallen off the dock and not landed underneath it). Therefore, the serious violation was affirmed.

From the federal district courts:

Court upheld personal jurisdiction against Costa Rican pineapple shipper for injury to longshoreman in Philadelphia and denied the shipper's motion to dismiss the longshoreman's strict liability claim. *Miranda v. C.H. Robinson Co.*, No. 18-553, 2019 U.S. Dist. Lexis 197120 (E.D. Pa. Nov. 13, 2019) (Baylson).

Opinion

Elliott Miranda was injured during the unloading of pineapples from a vessel in Philadelphia when he opened the shipping container to inspect the pineapples and a number of the pineapples fell on him. The pineapples were shipped by Upala to C.H. Robinson from Upala's farm in Costa Rica. Upala loaded and secured 1500 boxes of pineapples into a shipping container that was loaded onto a ship bound for Philadelphia. Miranda brought this suit against Upala and Robinson, including claims under the LHWCA and Pennsylvania law. Upala's motion to dismiss asserted that the court lacked both general and specific personal jurisdiction against this Costa Rican farming company because it had nothing to do with the shipment after it was loaded into the container in Costa Rica. Judge Baylson did not reach the question of general jurisdiction because he concluded that Upala was subject to specific jurisdiction. Upala contracted with Robinson to ship the pineapples to Philadelphia, so it took deliberate steps to ensure that the cargo arrived in Pennsylvania. After upholding personal jurisdiction, Judge Baylson addressed the validity of the plaintiff's claims. As the defendants were shipper and consignee of the container, they did not fall within the status of a vessel under the LHWCA, and Judge

Baylson dismissed the claims that were brought against them under Section 905(b) of the LHWCA. However, Judge Baylson did not dismiss the longshore worker's strict products liability claim against Upala and Robinson that was brought under Pennsylvania law. The defendants argued that Miranda was not a user of the pineapples to whom a strict liability claim is available. However, Miranda's amended complaint defined the product as including the pallets, boxes, packaging, and container in which the pineapples were shipped. Therefore, the complaint stated a products liability claim for defective packaging for which Miranda was an intended user.

Court ordered joinder of longshore worker's wife in suit against vessel interests. *Barton v. Hai Feng*, No. 4:19-cv-17, 2019 U.S. Dist. Lexis 198509 (S.D. Ga. Nov. 14, 2019) (Ray).

Opinion

Ahmad Barton brought this suit against the owner and operator of the vessel on which he was injured while serving as a longshore worker in the Port of Savannah. Arguing that Barton's wife should be joined as a party plaintiff to avoid the risk of the defendants being subject to double, multiple, or otherwise inconsistent obligations, the vessel interests moved for her joinder as a person needed for just adjudication. Magistrate Judge Ray agreed that the joinder of her loss of consortium claims was appropriate to avoid duplicative lawsuits and would not deprive the court of jurisdiction. Therefore, he granted the motion.

Court dismissed unseaworthiness claim of harbor worked injured on barge but granted him leave to replead his negligence allegations. *In re Vulcan Construction Materials, LLC,* No. 2:18-cv-668, 2019 U.S. Dist. Lexis 198292 (E.D. Va.. Nov. 14, 2019) (Leonard).

Opinion

The owner of the tug JEANIE CLAY brought a limitation action after the tug struck a barge on which Robert W. Dervishian was standing. Dervishian was the operations manager for T. Parker Host, and was not a seaman on the tug. Dervishian brought a claim in the limitation action in which he asserted claims of maritime negligence and unseaworthiness of the tug. Vulcan moved to dismiss the unseaworthiness claim on the ground that only a seaman employed on the vessel could bring an unseaworthiness claim. Dervishian did not dispute that he had no right to bring an unseaworthiness claim, but he claimed that the count actually was a negligence pleading. Judge Leonard reviewed the count and held that it did not allege negligence and should be dismissed. The tug owner argued that Dervishian should not be given a chance to replead the second count as he had already alleged a negligence count, but Judge Leonard held that there would be no prejudice to the owner in giving Dervishian the chance to plead another negligence theory and granted leave to file an amended claim.

And on the Maritime Front . . .

From the federal appellate courts:

Fifth Circuit reversed the denial of the claim under the Deepwater Horizon Economic and Property Damages Class Action Settlement Agreement of a company engaged in cramming (unauthorized charges to telephone users) for consideration by the district court. *Claimant ID 100235033 v. BP Exploration & Production, Inc.*, No. 18-30908 (5th Cir. Oct. 29, 2019) (Higginson).

Opinion

The question presented in this case is whether a claimant's unlawful conduct disqualifies it from participating in the Deepwater Horizon Economic and Property Damages Class Action Settlement Agreement, and, if so, what evidence is adequate to show that the claimant engaged in such conduct. The claimant was investigated by the United States Senate, the Federal Trade Commission, and various state attorneys general for cramming—unauthorized charges to telephone users by third-party vendors. The Senate report found the claimant and other companies were engaged in cramming, and the FTC settled with some of the companies but it did not assess a penalty or settlement with the claimant. The claimant did enter into an agreement with the Florida Attorney General for voluntary compliance by which it did not admit wrongdoing but agreed to refund to its customers $165,447 in addition to the $2 million it had already refunded/credited, and it was enjoined from enrolling Florida customers in services billable to a Florida landline or mobile phone bill. The Claims Administrator for the Deepwater Horizon settlement agreement denied recovery to claimant on the ground that its revenues were based on an illegal activity. However, the claimant responded that it had not been found guilty of illegal activity by anyone (the Senate finding was insufficient to establish criminal fault). Citing applicable maritime law, Judge Higginson noted that wrongdoing of a plaintiff does not bar relief unless the defendant can show that he has been personally injured by the plaintiff's conduct, which was not present in this case (BP did not claim that it was crammed by claimant). While not holding that the claimant had to recover on remand, Judge Higginson remanded the case for the district judge to set forth legal standards that should apply to claimants alleged to have been engaged in unlawful conduct and to apply those standards in this case.

Fifth Circuit affirmed exclusion of medical experts on specific causation for seaman's asbestos exposure and the granting of summary judgment on the seaman's claims under the Jones Act. *Schindler v. Dravo Basic Materials Co.*, No. 19-30126 (5th Cir. Nov. 5, 2019) (per curiam).

Opinion

Robert Schindler brought this suit against Dravo in federal court in Louisiana for exposure to asbestos in 1973 while he worked in the engine room of Dravo's dredge AVOCET that was collecting clam shells in Lake Pontchartrain. Dravo denied that there was asbestos on the dredge, but there was no way to verify that as the dredge was scuttled in 1991 to create an artificial reef off the Florida coast and Dravo no longer has any records relating to the dredge. Schindler's medical experts, Dr. Robert Harrison and Dr. David

Tarin, submitted reports anticipating testimony that exposure to asbestos on the dredge was a cause of Schindler's disease (specific causation). However, the experts' subsequent testimony admitted that their opinions were based on Schindler's interrogatory answer that insulation around pipes in the dredge's engine room contained asbestos, but Schindler testified that he had no specific recollection of seeing insulation on the dredge. The Fifth Circuit did provide some important points in the course of its discussion. First, Schindler argued that the abuse-of-discretion standard should not apply in a case where the exclusion of expert testimony results in a summary judgment, and that the appellate court should review the exclusion of expert testimony on the same de novo standard as it reviewed the granting of the summary judgment. The Fifth Circuit summarily dismissed that assertion as "clearly wrong" and then reviewed the exclusion for abuse of discretion. Second, the Fifth Circuit rejected the argument that a lower reliability bar is appropriate for expert testimony in a Jones Act case where there is a relaxed standard to prove causation. The same standards for reliability under *Daubert* and Rule 702 apply regardless of whether the case involves a seaman's relaxed burden on causation. With the preliminary legal issues resolved, the Fifth Circuit easily affirmed the exclusion of the expert opinion as it was based on an incorrect assumption of the presence of asbestos. With an absence of required expert testimony to establish causation, Schindler crafted an argument that Dravo should be equitably estopped from denying that asbestos exposure on the dredge was a cause of Schindler's cancer. As Dravo no longer has any records from that period, Schindler argued that Dravo could not contend that there was no asbestos exposure, citing a regulation that was issued in 1972 that required employers to monitor their employees' exposure to asbestos in places of employment where asbestos fibers were released. There were two problems with the application of that regulation. First, Dravo only had to maintain the records for three years (until 1976). Second, there was no evidence of asbestos exposure, so the regulation did not obligate Dravo to keep any records. Consequently, in the absence of evidence of causation from the dredge, the Fifth Circuit affirmed the dismissal of the Jones Act claims.

Designer of connected barges with oil skimmer cannot recover against BP for unjust enrichment for BP's use of a barge/skimmer barrier, without evidence as to how BP obtained his design. *Badeaux v. BP Exploration & Production, Inc.*, No. 18-31303 (5th Cir. Nov. 5, 2019) (per curiam).

Opinion

According to Barry Badeaux, after the Macondo/DEEPWATER HORIZON blowout in 2012 for which the initial efforts to stop the flow of oil failed, BP solicited input from the public and offered cash payments for useful ideas. Badeaux then devised a plan to prevent the oil from reaching local marshes with a barrier consisting of connected barges with attached oil skimmers. He drew up plans for his design and even build a prototype. He presented his design to the Jefferson Parish Council, and a council member submitted his drawing to the Coast Guard. After local officials from several parishes met with President Obama to ask for approval to use his design, his plan was approved by the Coast Guard and was implemented by several coastal parishes. Badeaux then called BP and asked for payment for using his design and even filed a claim in the Economic and Property Damage Settlement Agreement, but BP denied payment. Asserting that use of his design saved BP

a considerable amount in damages, Badeaux brought suit against BP based on unjust enrichment. The district court dismissed the action, and the Fifth Circuit affirmed. First, Badeaux never provided any description of the device that was ultimately used. Therefore, there was simply insufficient evidence that BP appropriated Badeaux's invention. Second, Badeaux failed to allege any facts as to how BP obtained his design. Badeaux argued that it was reasonable to assume that BP obtained the design from the Coast Guard or local officials who had the design, but the Fifth Circuit disagreed. That was nothing more than speculation and failed to meet the *Iqbal* plausibility requirement. Finally, Badeaux failed to establish the actual benefit conferred on BP.

Some defendants in long-running maritime asbestos cases waived personal jurisdiction defense. *Matthews v. Chas. Kurz & Co.*, Nos. 16-4146, 16-4269, 16-4354, 16-4757, 17-3238, 17-3480, 17-3735, 17-3915, 17-3918, 18-3077, 2019 U.S. App., Lexis 33474 (6th Cir. Nov. 8, 2019) (Siler).

Opinion

This case involves thousands of seamen who alleged causes of action for exposure to asbestos-containing products on vessels. The cases were filed in the Northern District of Ohio where many of the defendants filed motions to dismiss for lack of personal jurisdiction. The court concluded that many of the defendants were not subject to personal jurisdiction in that court and announced that the relevant cases should be transferred to venues with jurisdiction. However, the court never transferred the cases, and the defendants filed master answers preserving their personal-jurisdiction defense. Eventually, the cases were consolidated for pre-trial purposes by the Panel on Multidistrict Litigation in the Eastern District of Pennsylvania. The MDL court granted some motions to dismiss and denied the plaintiffs' request to transfer cases to venues with jurisdiction rather than dismissing them. The Sixth Circuit had previously ruled that the filing of the answer reserving the jurisdiction defense did not waive the defendants' right to assert the lack of personal jurisdiction. The question here was whether subsequent conduct of some defendants waived the defense. The Sixth Circuit held that two actions demonstrated waiver. First, in opposing transfer of the cases to Michigan, counsel noted that their clients had waived jurisdictional objections to proceeding in Cleveland. Second, the defendants sought a writ of mandamus directing the Northern District of Ohio to vacate its transfer order and to prevent the Eastern District of Michigan from exercising jurisdiction. Judge Siler concluded that the defendants had thereby consented to jurisdiction in Ohio.

Punitive damages held inapplicable to fisherman's wage case. *Dunn v. Hatch*, Nos. 18-35485, 18-35511, 2019 U.S. App. Lexis 34722 (9th Cir. Nov. 21, 2019) (per curiam).

Opinion

Eli Dunn served as a deckhand on a salmon fishing boat operated by Hatch pursuant to an oral contract as opposed to a written contract required by 46 U.S.C. § 10601. Dunn sought additional wages and punitive damages. After a bench trial, the district court awarded Dunn an additional $1,905.45 in wages for the violation of 46 U.S.C. §§ 10601

and 11701. The district court also awarded Dunn costs and attorney's fees as a sanction for Hatch's forgery of a written employment contract and failure to fully comply with discovery, but the court declined to award punitive damages against Hatch. The Ninth Circuit agreed. Citing the decision of the Supreme Court in *The Dutra Group v. Batterton*, the Ninth Circuit found no historical basis for allowing punitive damages in maritime wage disputes. The court considered this dispute to be a "mere statutory violation of having an oral contract rather than a written contract," which did not constitute a case of deplorable behavior or reckless disregard for the rights of others. The Ninth Circuit also affirmed the award of partial attorney's fees and costs that were related to the use of the forged document and the defendant's discovery misconduct as opposed to the entire case.

Punitive damages held inapplicable to fishermen's wage cases. *Haney v. Blake*, No. 17-35590, 2019 U.S. App. Lexis 34701 (9th Cir. Nov. 21, 2019) (per curiam).

Opinion

After the district court held a trial on the wage claims of two fishermen who were employed on the defendant's vessels fishing in Prince William Sound, the fishermen challenged the findings of the judge on the wages that were owed, and the Ninth Circuit affirmed the decision of the district judge. With respect to punitive damages, the district judge held that even if they were available they would not be warranted in this case, and the Ninth Circuit agreed. With respect to penalty claims that may be available under state law, the Ninth Circuit noted that the fishermen had failed to undertake any choice-of-law analysis or to set forth the evidence in the record of bad faith, so the dismissal of those claims was affirmed. As to the claims of the fishermen for attorney's fees, the Ninth Circuit noted that attorney's fees are not awarded as a matter of course in admiralty claims and are only awarded where the shipowner acted arbitrarily, recalcitrantly, or arbitrarily, and there was no such showing in this case. However, the Ninth Circuit noted that prejudgment interest is awarded in admiralty cases unless the judge articulates a reason for denying prejudgment interest. As no such reason was given in this case, the failure to award prejudgment interest on the wage claims was reversed.

Six-month delay in releasing arrested vessel held sufficient to order interlocutory sale; claim of wrongful acceleration of loan did not waive right to enforce final maturity payment. *TMF Trustee Ltd. v. M/T MEGACORE PHILOMENA*, Nos. 18-56189, 18-56561, 2019 U.S. App. Lexis 35421 (9th Cir. Nov. 26, 2019) (per curiam).

Opinion

The owner of the M/T MEGACORE PHILOMENA failed to make the maturity payment on the loan on its vessel, and the lender arrested the vessel. After the owner failed to bond the vessel for six months, the lender's request for an interlocutory sale was granted pursuant to Supplemental Rule E(9)(a)(1). The owner appealed and argued that it had not been given sufficient time to secure the vessel's release, but the Ninth Circuit agreed with the district court that six months was sufficient (noting that cases had held that delays as short as four months were unreasonable). The Ninth Circuit also rejected the owner's

argument that the lender had wrongfully accelerated the loan and that this was a breach of contract that waived the right to enforce the maturity payment requirement. Under English law, a wrongful acceleration has no contractual significance. And, even if it did, the remedy would be to bring a counterclaim. The order for interlocutory sale was affirmed.

Ninth Circuit really meant it when it told the district judge to lift the limitation stay. *In re Williams Sports Rentals*, No. 19-16691 (9th Cir. Nov. 26, 2019) (per curiam).

Opinion

This case involves a single claimant in a limitation of liability case involving the drowning of a rider on a jet ski in South Lake Tahoe. After Judge Mendez declined to lift the limitation stay, the Ninth Circuit reversed and ordered Judge Mendez to reconsider lifting the stay with a proper analysis of the single claimant exception to the concursus of claims. Instead of undertaking that analysis, Judge Mendez held that the owner of the jet ski should be exonerated and dismissed the case (see June and November 2019 Updates). This time the Ninth Circuit did not leave anything to chance and simply ordered Judge Mendez to dissolve the anti-suit injunction. The Ninth Circuit did state that Judge Mendez might wish to consider whether to stay the federal proceedings until the liability claim was adjudicated in state court, noting that it was premature to dismiss the claim at the pleading stage. In view of the clarity of its decision, the Ninth Circuit did not consider it necessary to reassign the case to a new judge on remand.

American injured on cruise that began and ended in Italy must bring suit in Italy, where the damage limitation is $64,000. *Lebedinsky v. MSC Cruises, S.A.*, No. 19-10455, 2019 U.S. App. Lexis 35549 (11th Cir. Nov. 27, 2019) (per curiam).

Opinion

Tara Lebedinsky's daughter booked an MSC cruise for her mother beginning and ending in Venice, Italy. Lebedinsky fell during the cruise and was flown to a New York hospital. When she brought suit in federal court in Florida, MSC moved to dismiss the action based on the Italian forum selection clause. The district court dismissed the case, and the Eleventh Circuit agreed. Lebedinsky first argued that the booking confirmation did not reasonably communicate the forum selection clause in plain language or conspicuously call attention to the forum selection clause. However, it was sufficient that the clause was set out with clear language, and she had the ability to become meaningfully informed of the clause and to reject its terms. The confirmation contained a notice with a link to MSC Cruises' website where the terms and conditions, including the forum selection clause could be found. Lebedinsky next argued that the forum was so inconvenient that the clause was unenforceable. However, the court of appeals noted that the cruise ship did not travel to the United States, and the injury was on a cruise that began and ended in Italy. The fact that her injury was extensively treated in New York was precisely the type of situation that the parties had in mind when they selected Italy as the forum for this Italian voyage. Finally, Lebedinsky argued that application of Italian law would deprive

her of a remedy. She asserted that she had damages of approximately $750,000, and that an Italian court would apply the Athens Convention that would limit her recovery to 46,666 SDRs, approximately $64,000. However, limits on liability are not the same as leaving the passenger without any recourse. Concluding that the limitation did not violate public policy, the Eleventh Circuit affirmed the dismissal of the action brought in the United States.

From the federal district and bankruptcy courts:

Passenger's suit for injury in fall in water on deck of cruise ship survived summary judgment on duty to warn but not on duty to maintain. *Petersen v. NCL (Bahamas) Ltd.*, No. 16-24421, 2019 U.S. Dist. Lexis 187368 (S.D. Fla. Oct. 28, 2019) (Smith).

Opinion

Robert Petersen was injured when he slipped in water on the pool deck of the NORWEGIAN BREAKAWAY while the ship was docked in Bermuda. It was windy and overcast, and water was blowing from a fountain. Prior to his accident, the cruise line had put a warning sign on the other side of the deck, but not on the side where Petersen was injured (Petersen walked by that sign when he first went out on the pool deck). Petersen knew the deck was wet. After the court initially granted summary judgment that the defendant did not have sufficient notice of the condition and that summary judgment was reversed by the Eleventh Circuit (October 2018 Update), Judge Smith denied summary judgment on the duty to warn claim on the ground that the defendant was on notice of the condition because the deck was wet from water from the fountain and the defendant had placed a warning sign on the other side of the deck. Judge Smith did grant summary judgment on the duty to maintain claim. The manufacturer of the weather decking recommended specific procedures for cleaning the deck surface that were not followed by the cruise line. However, Petersen did not offer any evidence how that failure caused the surface to become unreasonably slippery.

Seaman's inconsistent statements prevented summary judgment on the timeliness of his Jones Act and unseaworthiness claims, but his maintenance and cure claims were dismissed even though there were delays in payments. *Bautista v. Transoceanic Cable Ship Co.*, No. 18-151, 2019 U.S. Dist. Lexis 187587 (D. Haw. Oct. 29, 2019) (Seabright).

Opinion

The claims of Jose Bautista return to the Update (November 2018 Update) in connection with his injury while serving as a crewmember (cable splicer) on the C/S DECISIVE. He initially reported his accident to the ship's nurse on April 27, 2015, claiming that he was injured on March 16, 2015, by a large wave while he was securing a mooring line on deck. Transoceanic filed a declaratory judgment action on maintenance and cure, and Bautista testified that he did not recall how he was injured, but that his injury was between March 15 and May 2. Judge Kay found that Bautista suffered a back injury in service of the vessel

(but no neck injury) and that he reached maximum cure on August 21, 2017. Transoceanic made maintenance and cure payments until September 30, 2017, but there were delays in some of the payments, include one delay of 92 days. On April 26, 2018, Bautista filed this action with claims for Jones Act negligence, unseaworthiness, and maintenance and cure. His employer moved for summary judgment on two grounds: the Jones Act and unseaworthiness claims were barred by the three-year statute of limitations, and no maintenance and cure was owed. Bautista now asserted that the wave incident did not result in any injuries, and that his injuries resulted from pulling heavy cables on April 26, 2015—within three years of suit. His employer argued that his current declaration should be disregarded as a sham, but Judge Seabright disagreed. The reports to the nurse and doctors about the wave incident were not sworn, and his sworn testimony that he was unaware of what caused his injuries was "not entirely contradicted" by his current declaration that his injury occurred from pulling cables on April 26. Although the inconsistencies were "troubling," Judge Seabright believed they created fact questions for the jury to decide. However, Judge Seabright dismissed the maintenance and cure claims, citing the cases that hold that the similar delays in payment were insufficient, as a matter of law, to defeat summary judgment.

Seaman's suit by Dutch citizen who was injured in Spanish territorial waters against foreign defendants was dismissed for lack of personal jurisdiction and based on the foreign seaman exclusion in the Jones Act. *De Bree v. Pacific Drilling, Inc.*, No. 4:18-cv-4711, 2019 U.S. Dist. Lexis 202451 (S.D. Tex. Oct. 29, 2019) (Stacy), *adopted*, 2019 U.S. Dist. Lexis 201529 (S.D. Texas Nov. 20, 2019) (Hanen).

Recommendation

Opinion

Breen De Bree, a Dutch citizen, was injured in the territorial waters of Spain while working on the PACIFIC SANTA ANA and brought this suit as a seaman in state court in Houston, Texas. The suit was removed to federal court, and the last two defendants left in the case moved to dismiss the case for lack of personal jurisdiction and based on the foreign seaman exclusion in the Jones Act. De Bree alleged that the defendants were foreign corporations but had their principal place of business and nerve center in Texas. Magistrate Judge Stacy noted that these allegations were contested, and De Bree had to establish that jurisdiction over the defendants was proper in Texas. The defendants provided evidence that they had no contact with Texas, and Magistrate Judge Stacy found on the record that the defendants had none. De Bree then argued that he should be given the opportunity to conduct discovery on the theory that the defendants were alter egos of companies that did have their principal place of business in Texas. However, De Bree did not set forth any facts that would support a further inquiry on his alter ego theory, so Magistrate Judge Stacy declined to allow further jurisdictional discovery and held that the defendants should be dismissed for lack of personal jurisdiction. Magistrate Judge Stacy also addressed the foreign seaman exclusion in 46 U.S.C. § 30105 for non-citizens injured in exploration or production of minerals in the territorial waters or waters overlaying the continental shelf of a country other than the United States. De Bree argued that the exception did not apply when the seaman established that no remedy was

available under the laws of the country of his citizenship or where the accident occurred and that he should be allowed to conduct discovery on that exclusion. However, he did not assert the exception in his pleadings, did not ask for leave to amend, and did not set forth what discovery was needed. Therefore, Magistrate Judge Stacy held that De Bree's claims should also be dismissed under the foreign seaman exclusion to the Jones Act. Judge Hanen adopted Magistrate Judge Stacy's recommendations, noting that courts need more than a request for an unfettered fishing trip to authorize discovery. And, with respect to the foreign-seaman exclusion, the issue whether there was a remedy in Spain or the Netherlands was a matter of legal research "that should have been performed prior to filing the lawsuit."

Federal forum selection clause did not permit removal of Jones Act claim brought in state court. *Belanger v. McDermott International, Inc.*, No. H-19-1591, 2019 U.S. Dist. Lexis 188368 (S.D. Tex. Oct. 30, 2019) (Miller).

Opinion

This action was brought as a Jones Act claim in state court in Houston, Texas, and was removed to federal court based on a forum selection clause for the Southern District of Texas in the seaman's employment contract. Judge Miller first held that Belanger's general maritime claims were not removable based on the original admiralty jurisdiction of the federal courts and that an independent basis of federal jurisdiction was necessary. Judge Miller relied on the transformation argument enunciated in *Sanders v. Cambrian Consultants* that an admiralty case is somehow transformed into a non-admiralty case when it is filed in state court under the Saving-to-Suitors Clause [the transformation argument is contrary to the *Romero* decision of the Supreme Court and the *Baris* decision of the Fifth Circuit]. As to the forum selection clause, Judge Miller held that it did not overcome the statutory provision preventing removal of Jones Act claims, and the state court was competent to determine whether the forum selection clause should be enforced. Therefore, he remanded the case.

Court applied maritime law to seaman's claims against dock owner and dockside crane provider and denied the defendants' summary judgment motions. *Czyzykowski v. F/V Ocean View, Inc.*, No. 3:15-cv-2018, 2019 U.S. Dist. Lexis 188967 (D.N.J. Oct. 31, 2019) (Martinotti).

Opinion

Krzysztos Czyzykowski was injured in a dockside crane accident in the course of unloading large cages of clams from the fishing vessel E.S.S. PURSUIT on which Czyzykowski was a seaman. The dock was operated by Sea Watch, which used Satellite Crane to provide and operate cranes on the dock, which, in turn, used Jeffry Simmons to operate the crane involved in the accident. Czyzykowski sued all of these parties, and Sea Watch and Satellite Crane moved for summary judgment. The land-based defendants initially argued that admiralty law did not apply to the accident as it did not occur on navigable waters, but Judge Martinotti misapplied the rule that the Jones Act extends shoreside to seamen in the course of employment. Therefore, he held that admiralty jurisdiction extended to

the claims against the land-based contractors for the injury on land. Judge Martinotti declined, however, to apply the vicarious liability of seamen's Jones Act employers for the actions of their contractors who are acting in the furtherance of the employer's enterprise (from *Hopson v. Texaco*) and required that the seaman establish that the land-based defendants either exercised sufficient control over the independent contractor or that they negligently selected the contractor. Judge Martinotti found sufficient evidence of control of Sea Watch over Satellite Crane and of Satellite Crane over Simmons to defeat summary judgment. Further, Judge Martinotti found active participation of Sea Watch over the crane operations and rejected the argument that it owed no duty to seamen engaged in stevedoring operations at its dock as Sea Watch was more than a passive owner of the dock on which the seaman was injured.

Court denied passengers summary judgment against vessel owner because of failure to establish negligence as a matter of law; opinion of vessel owner's expert was excluded as a sanction because the contractor hired to repair the vessel discarded parts from failed steering system at a time when litigation was imminent. *In re New Canyonlands by Night, LLC*, No. 2:17-cv-1293, 2019 U.S. Dist. Lexis 190406, 2019 U.S. Dist. Lexis 190381 (D. Utah Nov. 1, 2019) (Nuffer).

Opinion summary judgment

Opinion sanction

These opinions involve injuries to passengers who brought claims in a limitation of liability action arising from a boating accident on the Colorado River near Moab, Utah. The passengers moved for summary judgment on the ground that the vessel interests (Canyonlands) were not entitled to exoneration or limitation of liability because Canyonlands was negligent and had privity or knowledge of the negligent acts. As the accident resulted from a failure in the steering system that caused the vessel to crash into the shoreline, the passengers argued that Canyonlands breached its duty of care by improperly installing the steering system, and by failing to have the steering system inspected at any time after its installation. The passengers cited evidence from the purchasing and installation of the steering system that indicated that the system was not suitable or that torque specifications were violated, but that indication was insufficient to establish the fault as a matter of law. With respect to the failure to inspect, the passengers failed to establish the appropriate standard of care with respect to inspection. Consequently, Judge Nuffer declined to decide the negligence issues as a matter of law. After the accident, Canyonlands' marine surveyor had the opportunity to inspect the vessel and preliminarily concluded that a failure in the steering system caused the accident. Canyonlands received notice that some of the injured passengers were represented by counsel, and the notice from counsel instructed Canyonlands to preserve business records related to the incident and information relating to the vessel. Nonetheless, four months after the accident, Canyonlands had the vessel delivered to a contractor for repairs for business purposes, but did not request that the vessel's damaged parts be preserved. The contractor discarded the damaged parts, and the passengers contended that this constituted spoliation of evidence. Judge Nuffer found that litigation was imminent when the vessel was delivered for repairs, that Canyonlands had failed to

provide notice to known claimants of the plans to have the vessel repaired, and that Canyonlands failed to request that the damaged parts be preserved. He concluded that the passengers had been prejudiced because Canyonlands' expert had the opportunity to inspect the damaged vessel, but the passengers' expert did not. As a sanction for the spoliation, Judge Nuffer decided to place the parties on the same footing by excluding the report of Canyonlands' expert and limiting Canyonlands' expert to the same evidence that was available to the passengers (e.g., photographs taken by government investigators and by Canyonlands' marine surveyor).

Attorneys' fees for experienced New York attorneys awarded at $300 and $225 per hour for asserting lien on vessel. *PMJ Capital Corp. v. THE LADY ANTOINETTE*, No. 1:16-cv-6242, 2019 U.S. Dist. Lexis 191236 (S.D.N.Y. Nov. 1, 2019) (Aaron).

Opinion

The New York Athletic Club entered into a vessel berthing/storage agreement with the owner of THE LADY ANTOINETTE and engaged the services of counsel to bring this action when the owner became delinquent in payment. Finding that the rates of $300 per hour for a maritime lawyer with over 30 years of experience and $225 for an experienced maritime attorney were reasonable, Magistrate Judge Aaron recommended that fees be awarded in the amount of $33,509.16.

Doctor may rely on other practitioners to rule out other causes of plaintiff's condition in arriving at diagnosis; doctor may testify about future treatment that he called speculative; economist may testify about the value of home health aide services; liability expert may testify about industry practices as it does not invade the province of the fact finder; physical therapist assistant may testify about the functional capacity evaluation he conducted; and economist may testify about loss of earning capacity based on the FCE. *Schlueter v. Ingram Barge Co.*, No. 3:16-cv-2079, 2019 U.S. Dist. Lexis 190066 (M.D. Tenn. Nov. 1, 2019) 2019 U.S. Dist. Lexis 199454 (M.D. Tenn. Nov. 18, 2019) (Trauger).

Opinion

Opinion Giles

Bobby Schlueter was injured while serving as a seaman on the defendant's vessel when the winch he was tightening in cold and icy conditions gave way causing him to slip and fall to the deck. Each side moved to strike the testimony of experts hired by the other side. Dr. Benjamin Johnson, an anesthesiologist and pain management specialist, diagnosed Schlueter with Complex Regional Pain Syndrome, but he admitted that he did not conform to the AMA Guides because he failed to rule out other possible causes of the plaintiff's symptoms. However, Judge Trauger noted that Dr. Johnson had relied on records of other doctors, and they had diagnosed CRPS after ruling out other symptoms. Therefore, Dr. Johnson was permitted to give his opinion on the plaintiff's condition as CRPS and to testify about future treatment that the plaintiff "might need" that he had

called "speculative." Judge Trauger was not persuaded that Dr. Johnson understood that word as a legal term of art, so the degree of uncertainty went to the weight of his testimony, not to its admissibility. The defendant moved to exclude the testimony of plaintiff's economist, Robert E. "Jay" Marsh, with respect to the value of home health aide services on the ground that the opinion was not based on actual medical evidence. As there was not an issue whether such services were recoverable, Judge Trauger held that the characterization of the services as medical by Marsh was simply a matter of convenience that did not prevent the testimony in support of such damages as pecuniary losses. The plaintiff objected to the testimony of Earl Bruce Darst, a river boat captain, that Schlueter failed to clear the ice on the winch and that the defendant's supervisor had no responsibility to ensure that the dog of the winch was properly seated, as it does not involve specialized knowledge for an expert and communicates legal standards that invade the province of the jury. Judge Trauger rejected these arguments as Darst's testimony addressed responsibility, failure in duties, and normal operation, not legal conclusions such as negligence, and the standards were unlikely to be familiar to the jury. The plaintiff objected to the testimony of Todd Didion, a licensed physical therapist assistant about the plaintiff's capability to perform sedentary work based on the functional capacity evaluation he conducted. The plaintiff cited Tennessee law that a PTA may perform services only under the supervision of a licensed PT, who must perform any initial evaluation, develop the treatment plan, and supervise the services performed by the PT. As the law does not prevent the PTA from performing an FCE, and as the FCE was performed under the supervision of a PT (who signed the FCE), Judge Trauger declined to exclude the testimony of the PTA or the economist whose testimony was based on the plaintiff's being able to work at a sedentary level as set forth in the FCE. In the second opinion on experts, Judge Trauger addressed the testimony of the emergency room physician who examined Schlueter when he arrived at the hospital. He conducted a neurological examination and assessment and concluded that the results were very suspect for malingering. Schlueter moved to exclude Dr. Giles's testimony, and Judge Trauger agreed. She noted that Dr. Giles, who has been performing emergency care for almost 30 years, was qualified to perform a neurological examination but was not an expert in neurology or in treating CRPS, and he had not established that the neurological examination that he performed was appropriate for patients complaining of pain associated with CRPS or that the tests that he performed were accepted in the medical community for the diagnosis of CRPS.

Summary judgment on seaman status was denied based on the captain's inconsistent statements, but no sanctions were awarded. *Saltzman v. Whisper Yacht, Ltd.*, No. 19-285, 2019 U.S. Dist. Lexis 190651 (D.R.I. Nov. 4, 2019) (Sullivan).

Opinion

Robert Saltzman was injured on September 4, 2017, while serving as a deckhand on the S/Y WHISPER while it was in the Newport Shipyard. He brought suit as a seaman, and his employer filed a motion for summary judgment arguing that his employment was transitory and sporadic, based on the affidavit of Captain Davidson. Saltzman responded with a letter from Captain Davidson dated April 13, 2017 in which he confirmed that Saltzman was permanently employed on the vessel and held the position indefinitely. The

employer sought to withdraw its motion, and Saltzman argued that, as a sanction, he should be held to be a seaman as a matter of law. Magistrate Judge Sullivan considered it would be unfair to permit withdrawal, and she denied the motion outright, noting that leave of court was necessary to file another motion for summary judgment. Although the April letter raised serious questions about the Captain's veracity, Magistrate Judge Sullivan believed that the record was too undeveloped to warrant a finding of egregious conduct necessary to impose sanctions.

Faulty repairs to vessel invalidated hull policy. *National Liability & Fire Insurance Co. v. Carman*, No. 17-38, 2019 U.S. Dist. Lexis 193198 (D.R.I. Nov. 4, 2019) (McConnell).

Opinion

Nathan Carman purchased a used vessel and had it insured with an agreed-value hull policy after the vessel was inspected and found to be seaworthy. He received a binder for the policy, and the insurer asserted that it sent him the policy. The policy contained an exclusion for loss or damage caused directly or indirectly from incomplete, improper, or faulty repair. Nine months later, Carman took the boat from Ram Point Marina on a fishing trip. Before departing, he removed the trim tabs and took off the actuator from the transom. He had to drill holes in the hull to allow him to remove a fitting, and he filled the holes using a package of Epoxy Putty Stick and a Fiberglass Boat Repair Kit. He did not follow the instructions, filling the holes with the epoxy putty, but failing to place the fiberglass mat fabric on the outside of the hull to seal the holes. When the boat sank at sea, the insurer denied the claim based on the faulty repairs. Carman argued that he had never received the policy with the exclusion, but Judge McConnell applied the exclusion and held that the insurer had carried its burden of proof to establish that the vessel was unseaworthy from improper repairs, resulting in the denial of coverage.

Court upheld *McCorpen* defense to seaman's maintenance and cure claim based on prior neck and back injuries. *Daggs v. Gulf Offshore Logistics, LLC*, No. 19-71, 2019 U.S. Dist. Lexis 190809 (Nov. 4. 2019) (Ashe).

Opinion

Joseph Daggs brought this seaman's suit for injuries he claimed to have sustained on November 30, 2018, in a slip and fall on the M/V BRIANA MARIE. When he applied for employment a month earlier on October 30, 2018, Daggs circled N for NO with respect to back pain and neck pain for the question whether "you currently have the following symptoms or have significantly in the past." However, Daggs had prior back and neck injuries from one work injury and two auto accidents. He had even sought short-term disability for his low back pain. The defendants asserted the *McCorpen* willful concealment defense, and Judge Ashe found that the defendants had satisfied each element of the defense. Daggs argued that there was no willful concealment because the question asked if he was experiencing symptoms "currently" or "significantly in the past." He argued that he was not experiencing symptoms when he filled out the questionnaire and that he did not believe (subjectively) that his symptoms in the past were significant.

Judge Ashe rejected that argument for two reasons. First, Daggs admitted that his answers to the questionnaire were false. Second, the Fifth Circuit and the district courts in that Circuit have reviewed the intentional concealment prong from an objective, not subjective basis. Following cases where the questionnaire had the same "significantly" language, Judge Ashe held that the intentional concealment prong was satisfied. With respect to the materiality prong of the test, Daggs argued that his employer had tested his physical ability to work as a deckhand before hiring him, and that the questionnaire was only a small part of the overall hiring process. The employer did not present testimony that Daggs would not have been hired had he answered accurately, only that the employer would have required further medical information concerning his capability to perform the duties of a deckhand. However, Judge Ashe noted the courts have granted summary judgment on the materiality prong when the evidence establishes that full disclosure would have prompted the employer to conduct further medical evaluation prior to making the hiring decision. The fact that Daggs worked for a month did not change the materiality decision because, as the courts have held in other cases, the employer's decision was based in part on whether the applicants experienced prior problems, not whether they could perform manual tasks on the date of their application. Finally, Judge Ashe rejected Daggs' argument that the employer failed to establish causal connection on the ground that Daggs' injuries in the past to his back and neck were insufficiently connected to the back and neck injuries alleged in this case. A review of the medical records demonstrated that Daggs' current symptoms were to the same parts of the body. Consequently, Judge Ashe held that Daggs was barred from recovery of maintenance and cure.

Court struck Dr. Skolnick's opinions on prognosis and causation but not his opinions on the seaman's current symptomology. *Flynn v. Delaware River & Bay Authority*, No. 18-10505, 2019 U.S. Dist. Lexis 191408 (D.N.J. Nov. 5, 2019) (Schneider).

Opinion

Dennis Flynn was injured while serving as the pilot of a passenger vessel when he was thrown from his chair. For some time before the accident Flynn was treated for neck problems for which he planned to have cervical surgery for the persistent pain and worsening numbness in his fingers. After the accident, Flynn complained of injuries to his right shoulder and knee and denied neck or back pain. Flynn's complaints of neck pain related to the accident changed when he submitted the report of his trial expert, orthopedic surgeon Cary Skolnick. The parties agreed that Flynn's rotator cuff tear was the result of his accident, but Dr. Skolnick also opined that Flynn's cervical spine was weakened by the accident and that his cervical complaints were causally related to the accident. He then opined with respect to Flynn's ability to function and work due to the injuries. The defendant then moved to exclude the report and testimony of Dr. Skolnick, and Judge Schneider agreed in part. As Dr. Skolnick had examined Flynn, he was allowed to opine with respect to his current symptomology. However, the opinion was devoid of any methodology as to how Flynn's injuries resulted from the incident. Judge Schneider considered that the doctor had presented a "net opinion"—one that contains conclusions unsupported by factual evidence. Noting that this was not the first time that Dr. Skolnick had presented a court with a net opinion, Judge Schneider held that Dr. Skolnick's

opinions regarding prognosis and causation left too large a gap between the data presented and the conclusions rendered and did not satisfy *Daubert*'s requirements.

Counterclaims were allowed to proceed in contract dispute over yacht sale. *Hatteras/Cabo Yachts, LLC v. M/Y EPIC*, No. 4:17-cv-25, 2019 U.S. Dist. Lexis 192641 (E.D.N.C. Nov. 6, 2019) (Britt).

Opinion

Hatteras entered into a sales contract with Spisso as agent for Acquaviva to construct a yacht. After Spisso filed suit for breach of contract and warranties, the parties entered into a settlement agreement for a purchase/sale of another yacht. The day after Spisso arrived to take possession, the vessel caught fire with him and his guests onboard, and the vessel was returned to shore where it remained in custody of Hatteras. Hatteras offered to repair the damage, but Spisso refused to take possession, and Hatteras incurred costs for which it brought suit against the yacht and Acquaviva. Acquaviva (and Spisso as an intervenor) brought a fifteen-count counterclaim against Hatteras and two other entities, and the counter-defendants moved to dismiss. The court declined the motion, finding sufficient pleading of the claims. In particular, Judge Britt applied North Carolina law (sale of a vessel) to find an exception to the economic loss rule that generally provides that economic losses must be recovered in contract and not in tort. Here, Judge Britt allowed the negligence count to proceed because an employee of Hatteras left combustible items in a tool bag in the engine room during the delivery stage at which time Hatteras was a bailee. Judge Britt also allowed Spisso to claim emotional suffering from the inhalation of smoke on the vessel as a negligence claim and not as a claim for negligent infliction of emotional distress. However, Judge Britt did note that the counterclaim was unclear in some counts as to which party was the subject of a particular count, referring to Counterclaim Defendants." Therefore, he ordered Acquaviva and Spisso to provide a more definite statement as to the parties subject to those counts.

Vicarious liability for actions of the crew was applied to death of cruise ship passenger. *Noon v. Carnival Corp.*, No. 18-23181, 2019 U.S. Dist. Lexis 193931 (S.D. Fla. Nov. 6, 2019) (Torres).

Opinion

The litigation over Karen Noon's death on disembarkation from Carnival's vessel returns to the Update (September 2019 Update) for Carnival's motion for summary judgment. Noon experienced shortness of breath while on the vessel, and the personnel at the medical center on the vessel provided an oxygen tank without examining Ms. Noon. When it was time to depart the vessel the next day at the end of the voyage, two crewmembers came to her cabin and retrieved the oxygen tank without examining her. They also denied her request to take the oxygen tank with her when she went to the emergency room. Upon leaving the ship without any crewmember assistance, she went into respiratory arrest and was pronounced dead after being transported to the hospital by Miami-Dade Fire Rescue. Applying maritime law, Magistrate Judge Torres denied Carnival's motion on all liability arguments. In the course of his discussion, Magistrate Judge Torres denied Carnival's

argument that vicarious liability cannot attach to the actions of the crewmembers because the crewmembers do not owe a duty of care to passengers under the general maritime law. The allegations of vicarious liability of the crew were sufficient to state a cause of action against the cruise line. As there were allegations against the medical staff, Carnival argued that the failure of Noon's husband to provide expert testimony of the standard of care required summary judgment on the claims involving the medical staff. Magistrate Judge Torres noted that this question required a determination whether the complaint arose under ordinary negligence or medical malpractice. As Carnival did not present any substantive reasons why the case against the medical staff constituted medical malpractice, Magistrate Judge Torres denied Carnival's motion. Noon's husband then sought to relitigate the punitive damage question from the previous decision in which Magistrate Judge Torres held that punitive damages were not available absent intentional wrongdoing. Magistrate Judge Torres reaffirmed his prior decision and held that the plaintiff had not presented any evidence that Carnival's actions rose to the level of intentional misconduct. Finally, Magistrate Judge Torres agreed that the plaintiff's demand for lost earnings/earning capacity, net accumulations, and loss of support and services were either not recoverable under the Florida Wrongful Death Act or were not supported in the record.

Pro rata sharing of *custodia legis* expenses was applied to vessel mortgagee. *Coastal Marine Management, LLC v. Additional Return, LLC*, No. 16-11616, 2019 U.S. Dist. Lexis 192471 (D. Mass. Nov. 6, 2019) (Gorton).

Opinion

After a shipyard brought this action to arrest a vessel and was appointed substitute custodian, the vessel's mortgagee intervened in the proceeding, and the shipyard sought to have the mortgagee pay a proportionate portion of the *custodia legis* expenses that were being incurred by the shipyard. The mortgagee objected on the ground that the expenses should be dependent on whether the intervenor was entitled to a pro rata share of the sale proceeds. Judge Gorton disagreed and held that all of the intervenors should share in the cost of arresting and maintaining the vessel. The mortgagee was not required to intervene, and the possibility of recovery on its note from the sale proceeds was sufficient that it chose to intervene. Along with the possibility of recovery comes the responsibility to preserve the property. Therefore, the shipyard was entitled to recover a proportionate part of its expenses from the mortgagee. And, as there was no exception to the general rule that pre-judgment interest is awarded in admiralty cases, Judge Gorton added pre-judgment interest to the award.

Striking of experts resulted in summary judgment in maritime products liability case. *Wells v. Kawasaki Motors Corp.,* No. 2:16-cv-1086, 2019 U.S. Dist. Lexis 194799 (D. Utah Nov. 7, 2019) (Nuffer).

Opinion

This suit involves products liability claims of Nicole Wells against Kawasaki after she fell off the back of a personal watercraft manufactured by Kawasaki. She brought claims for

inadequate warnings and for design defect. After he struck her experts, Judge Nuffer granted summary judgment to Kawasaki. Applying maritime law to this incident that occurred on navigable waters, Judge Nuffer held that the plaintiff is required to provide expert evidence or opinion supporting both failure to warn and design defect cases. The absence of such evidence resulted in the dismissal of Wells' claims against Kawasaki.

Admiralty law and uberrimae fidei were applied to a cargo insurance policy for a claim of theft from a warehouse, but fact questions precluded summary judgment for insurer. *XL Specialty Insurance Co. v. Prestige Fragrances, Inc.*, No. 18 Civ. 733, 2019 U.S. Dist. Lexis 194707 (S.D.N.Y. Nov. 8, 2019) (Gardephe).

Opinion

Prestige is a wholesale distributor of brand-name fragrances and cosmetics. Over half of its goods are imported and shipped via oceangoing vessels where they are stored at its warehouse in New Jersey. When it began importing goods, Prestige purchased marine cargo insurance, and the carriers changed as it sustained losses, including a theft loss in 2010 (thieves broke through the wall to an adjacent vacant warehouse) of inventory worth $790,642.97 and loss of business property and business interruption of $331,321.14. That warehouse loss was followed by smaller cargo claims in 2012 and 2013. Frenkel & Co. entered into an Insurance Producer Agreement with XL Specialty and then began soliciting Prestige in 2014. The Agreement provided that Frenkel had limited authority, such as to collect and transmit premiums, but that it was not an agent of XL Specialty and was instead an agent of the insured. At XL Specialty's behest, Frenkel inquired about losses sustained by Prestige but its inquiries were not answered. Frenkel's representative believed that the CEO of Prestige had said that there were no losses, but the CEO denied that he had said that. XL Specialty agreed to bind the policy conditioned on receipt of loss information from the past five years. The CEO testified that he had informed the Frenkel representative about the three losses without any information on the amounts, but in response to the request for loss information, the CEO only reported the last cargo claim and did not report the other two losses. The policy was renewed before there was a survey of the warehouse in 2016 at which the CEO explained to the surveyor about the theft loss and advised that it was about $200,000. This information was included in the survey report, but it was not noticed by XL Specialty. XL Specialty continued to renew the policy until thieves broke into the warehouse and stole goods valued at more than $1.2 million during the July 4, 2017, holiday weekend. After investigating the circumstances, XL rescinded the policies, declared them void ab initio, denied the claim, and instituted this action. Judge Gardephe agreed with XL Specialty that the policies were contracts of marine insurance, to which admiralty law applied. Although all of the losses, including the loss at issue in this litigation, occurred in a land-based warehouse, the primary object of the policies was to facilitate the transportation of goods by sea from abroad to the United States. Thus, even though the largest risk exposure was the land-based storage, the policy was maritime under *Kirby* (train derailment in Alabama was governed by a maritime contract that involved shipment of goods by sea and by land) because the storage of goods could not be divorced from the shipping of those goods by sea. As the maritime law extended the doctrine of uberrimae fidei (utmost good faith) to the policy (in all circuits that have decided the issue except the Fifth Circuit), Judge Gardephe had

to decide whether the Fraud Notice contained within the Notice to Policyholders section of the policy was sufficient to modify the strict application of the doctrine. The language provided that a willful concealment or misrepresentation of material fact would be grounds to rescind the policy. Judge Gardephe did not have to decide if that language was sufficient to contract around uberrimae fidei, holding that the Fraud Notice could not be construed as a part of the contract. Judge Gardephe was not able to decide whether the rescission of the policy should be upheld as there were fact questions whether Frenkel was XL Specialty's agent and whether the disclosures that were made by Prestige were sufficient to comply with its obligations under the uberrimae fidei doctrine.

Expert can rely on Coast Guard report as long as it is not the sole source of his opinions; owner of vessel operator can testify as to repair costs, project estimates, and labor hours; owner of vessel with more than 35 years of experience with electrical systems may testify as an expert about a vessel's electrical system. *Maine Windjammers, Inc. v. SEA3, LLC*, No. 2:18-cv-242, 2019 U.S. Dist. Lexis 194499, 2019 U.S. Dist. Lexis 194500, 2019 U.S. Dist. Lexis 194507 (D. Me. Nov. 8, 2019) (Rich).

Opinion Hill

Opinion Larsen

Opinion Driscoll

Windjammers and Sea3 entered into an agreement by which Sea3 leased the S/V HALIE & MATTHEW with an option to purchase the vessel. Sea3 eventually abandoned the vessel after making substantial repairs and improvements, arguing that the vessel was delivered to Sea3 in an unseaworthy condition. Windjammers sued for breach of contract, promissory estoppel, unjust enrichment, and damage to the vessel, and Sea3 counterclaimed for breach of contract, breach of the warranty of seaworthiness, quantum meruit, and unjust enrichment. These opinions address the experts designated by the parties. Windjammer objected to the designation of Thomas Hill, a marine surveyor, on several grounds, including his interpretation of the contract and his reliance on the Coast Guard Incident Investigation Report. After reviewing Hill's report, Judge Rich concluded that the conclusions were most reasonably characterized as implicating industry practices and standards and not contract interpretation. Although the findings of fact, opinions, recommendations, deliberations, and conclusions from the Coast Guard report are not admissible, the Coast Guard report was not the sole source of his knowledge. Thus, his opinion was admissible as long as any references to the report were stricken. Windjammers also objected to the testimony of Robert Larsen, president of Sea3 with respect to repair costs, project estimates, labor hours, and value added to the vessel. As the testimony was offered as lay testimony based on first-hand knowledge, Judge Rich declined to strike his opinion. Judge Rich did not grant relief with respect to testimony about added value, as Windjammers could point to no portion of the testimony offering that opinion. Sea3 objected to the opinions of Patrick Driscoll, owner of Windjammers, with respect to the vessel's electrical system. Although Driscoll is a licensed master electrician with more than 35 years of experience in electrical systems, he was not a

"marine electrician." However, with his experience as an electrician and his specific experience with the vessel, Judge Rich held that Driscoll was qualified to testify and that his experience as a marine electrician was a subject for cross-examination.

Collusion allegations against Judge Barbier resulted in referral for disciplinary proceedings. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. 2:10-md-2179, 2019 U.S. Dist. Lexis 194393 (E.D. La. Nov. 8, 2019) (Barbier).

Opinion

Tampa attorney Brian Donovan, who has written a book entitled "Collusion: Judicial Discretion vs. Judicial Deception –The Impending Meltdown of the United States Federal Judicial System," turned his sights on Judge Barbier in connection with the handling of the multidistrict litigation over the Macondo/DEEPWATER HORIZON blowout in 2010. Although Judge Barbier presided over claims brought by Donovan on behalf of his clients since 2011 and 2013, Donovan recently dredged up the fact that Judge Barbier owned debt instruments in pivotal parties Halliburton and Transocean (which were not parties to the claims of Donovan's clients) at the time of the incident, As Judge Barbier sold those bonds before assuming the handling of this litigation, he had previously denied requests for recusal and that issue was dormant until raised by Donovan years later in July 2019. Judge Barbier ruled that it was too late to raise that issue now, and Donovan moved on to accuse Judge Barbier of collusion with a host of different persons and parties, including the attorneys Judge Barbier appointed to "allegedly" represent the plaintiffs, BP, and the administrator of the proposed settlement. Donovan's motion, however, was even less successful than his book (number 425,180 in Amazon's Best Sellers Rank). Not only did Judge Barbier deny the motion, noting that "Movants' views are not those of a 'well-informed, thoughtful and objective observer,'" but Judge Barbier also initiated a disciplinary proceeding against Donovan under the Court's Rules for Lawyer Disciplinary Enforcement.

Dredging company held liable for damage to vessel that struck its unmarked pipe. *Rose Crewboat Services, Inc. v. Wood Resources, LLC*, No. 17-7052, 2019 U.S. Dist. Lexis 195773 (E.D. La. Nov. 12, 2019) (Vance).

Opinion

In the early morning hours of July 23, 2016, Captain George Bonck was navigating Rose Crewboats' M/V SAM B on the Mississippi River when he claimed that the vessel struck a submerged dredge pipe that was unlit and unmarked and in the vicinity of Wood Resoruces' dock. Once he got off his vessel, Captain Bonck could see the submerged pipe. Wood Resources countered Captain Bonck's version with testimony that the dredging project was completed about a week before the incident and that the pipeline is generally taken out of the water within 24 hours. Judge Vance tried the case on briefs, credited the testimony of Captain Bonck, and held that the vessel had struck the unmarked dredge pipe. Turning to whether Wood Resources was negligent, Judge Vance noted the regulation that imposes a duty to mark a submerged dredge pipe that is applicable to

vessels engaged in dredging. That regulation was inapplicable in this case as the dredging operations were completed. However, another regulation requires marking of obstructions to navigable waters. As the pipeline obstructed navigable waters, Wood Resources had a duty to mark the pipe, and it was negligent per se for failing to do so. Judge Vance then awarded damages to Rose Crewboats for the damage to the vessel along with pre-judgment interest in this admiralty case, but she declined to award attorney's fees as the defendant did not act in bad faith.

Jury must be advised of discounts or write-offs for passenger's medical bills. *Thompson v. Carnival Corp.*, No. 18-cv-20740, 2019 U.S. Dist. Lexis 196128 (S.D. Fla. Nov. 12, 2019) (McAliley).

Opinion

The cruise-line defendant in a suit for injuries sustained by passenger Francenia Thompson filed a motion in limine in which it sought an order that the passenger could introduce medical bills that only reflected the amounts that the passenger actually paid or was obligated to pay. Following the majority rule, Judge McAliley granted the motion and held that the passenger would not be allowed to introduce evidence of her full medical bills, reasoning that the jury must be advised of the discounts or write-offs in order for there to be a fair assessment of the reasonable medical expenses.

Court declined to certify order of remand for an interlocutory appeal despite the different conclusions reached by the district courts on the issue whether cases can be removed based on the original admiralty jurisdiction of the federal courts. *Great Northern & Southern Navigation Co. v. Certain Underwriters at Lloyd's London*, No. 14-4665, 2019 U.S. Dist. Lexis 196309 (E.D. La. Nov. 13, 2019) (Vitter).

Opinion

This insurance dispute was removed to federal court by the Lloyd's underwriters based on diversity. The plaintiffs' challenged the diversity of the parties and also alleged that the case could not be removed based on the court's original admiralty jurisdiction. Concluding that the parties were not diverse and that there was no removal jurisdiction based on the court's admiralty jurisdiction, Judge Vitter held that the case should be remanded to state court. Lloyd's asked that the case be certified for an interlocutory appeal. Although Judge Vitter noted that the district courts have reached different conclusions with respect to whether cases can be removed based on the court's admiralty jurisdiction, she ruled that the interlocutory appeal would not advance this piece of litigation and declined to certify the case for appeal so that the removal issue could be resolved.

Claiming seaman status as a stalling tactic did not prevent the court from ordering arbitration. *Kelly v. Berry Contracting, LP*, No. 19-10501, 2019 U.S. Dist. Lexis 196549 (E.D. La. Nov. 13, 2019) (Milazzo).

Opinion

Anthony Kelly and Wilfred Henry, Jr., brought claims for racial discrimination and retaliation against their employer and claims for intentional infliction of emotional distress and assault against their supervisor. The defendants then moved to compel arbitration of the claims pursuant to arbitration agreements signed by the plaintiffs when they were hired. The plaintiffs responded that they were seamen who are exempt from arbitration under the Federal Arbitration Act. Judge Milazzo noted that the party resisting arbitration has the burden to prove that the dispute is not arbitrable; however, the plaintiffs did not provide sufficient information to determine whether their work was from vessels or whether the vessels were in navigation. The plaintiffs asked for additional time to conduct discovery about their status, but Judge Milazzo responded that much of the information to determine their status was within their own personal knowledge. Their failure to provide that information along with the "unconvincing" information that they did provide, convinced Judge Milazzo that their request for discovery was "little more than a stalling tactic." She denied their request, ordered the case to be arbitrated, and dismissed the suit.

Tom Stakelum allowed to testify on navigation options in vessel collision case. *ADM International SARL v. River Ventures, LLC*, No. 18-3466, 2019 U.S. Dist. Lexis 197546 (E.D. La. Nov. 14, 2019) (Fallon).

Opinion

This case involves a collision between ADM's M/V HARVEST MOON and River Ventures' M/V FREEDOM and its tow. ADM sought to exclude the testimony of Tom Stakelum regarding the navigational decisions of the HARVEST MOON. Although River Ventures responded that Stakelum did not exceed his qualifications because he was simply interpreting data and providing a factual statement of what happened based on the data, ADM responded that Stakelum was not only stating a fact but was questioning the navigational decisions of the pilot and master of the vessel. Judge Fallon agreed with River Ventures that Stakelum's testimony should not be excluded as he was simply interpreting data and providing observations of what occurred, which was within his qualifications.

Court declined to vacate arrest of vessel for contested ship repairs, and declined to award countersecurity for loss of use of the vessel. *International Ship Repair & Marine Services v. Barge B. 215,* No. 8:19-cv-605, 2019 U.S. Dist. Lexis 197531 (M.D. Fla. Nov. 14, 2019) (Tuite).

Opinion

This dispute arose when the American Bureau of Shipping inspected barge B. 215 and recommended that the barge be taken to a shipyard for repairs and an assessment of the steel in its deck. After that assessment, the barge was taken to International Ship Repair's facility to install replacement steel plates on the deck for a fixed price of $4.2 million with a no-growth clause requiring advance approval for any additional work. During the work,

the Coast Guard and ABS identified additional work to be completed, but the vessel manager did not authorize it. The shipyard then advised that continued performance of the contract would require work outside the contract, and the barge manager instructed the shipyard to stop all work, although the barge remained berthed at the shipyard. The shipyard arrested the vessel for work that had been completed but not paid and for berthing charges. The barge manager responded by moving to vacate the arrest and, alternatively, for countersecurity for its loss of use of the vessel while the work remained unfinished. The barge manager asserted a commercial frustration argument, that the contract was thwarted by the additional work identified by ABS and the Coast Guard, thereby relieving both parties of their contractual obligations, leaving the vessel responsible only for quantum meruit for the services rendered (which the manager valued at less than what was paid). Magistrate Judge Tuite held a hearing and concluded that there was a fact dispute as to what was owed. As such, the shipyard had established sufficient grounds for the arrest, and he recommended that the motion to vacate the arrest be denied. He then reviewed the evidence as to the value of the claim and set the security for the release of the vessel. The security did not include the shipyard's projected profit as that was too speculative at this stage. Magistrate Judge Tuite did not require countersecurity to cover the loss of use of the vessel during the arrest as there was no chance of the barge obtaining class certification even if the shipyard had performed all the work under the contract.

Court dismissed claims of passenger against cruise line for injury during shore excursion in Cozumel for failure to state a claim and against the excursion company for lack of personal jurisdiction. *Zhang v. Royal Caribbean Cruises, Ltd.*, No. 19-20773, 2019 U.S. Dist. Lexis 199362 (S.D. Fla. Nov. 14, 2019) (Scola).

Opinion

Sanlu Zhang was a passenger on Royal Caribbean's OASIS OF THE SEAS. He was injured during a shore excursion in Cozumel, Mexico, when the bus taking him to Mayan ruins hit a pothole. Zhang brought suit in Florida against the cruise line and the company that operated the excursion under contract with the cruise line. Having previously dismissed the allegations against the cruise line as a shotgun pleading, Judge Scola dismissed the allegations a second time for failure to state a claim against the cruise line (negligence; apparent agency, agency by estoppel, and joint venture; misleading advertising and negligent misrepresentation; third-party beneficiary status to the contract between the cruise line and excursion company; and breach of fiduciary duty). Zhang asserted that there was personal jurisdiction over the excursion company because it had committed a tort in part in Florida and because Zhang was a beneficiary of the contract entered into between the cruise line, headquartered in Florida, and the excursion company. Zhang could not sustain an argument for personal jurisdiction against the excursion company based on the accident in Cozumel and instead alleged a tort in Florida for failure to provide adequate medical care in Miami to Zhang after the accident. However, Zhang did not allege how the excursion operator breached a duty in Florida or how its conduct resulted in further injury. The claim that Zhang was a beneficiary of the contract between the cruise line and excursion company foundered on the language of the contract that

disclaimed any third party rights or remedies based on the contract. Although Judge Scola dismissed the amended complaint without prejudice, he denied Zhang leave to amend it.

Court applied the new Fifth Circuit test on what is a maritime contract to hold that a contract for the relocation of a hydraulic flood control gate on the Mississippi River was maritime and then held that parole evidence was permitted to determine whether the written contract was modified. *Couvillion Group LLC v. Quality First Construction, LLC*, No. 19-676, 2019 U.S. Dist. Lexis 198356, 198357 (E.D. La. Nov. 15, 2019) (Vitter).

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Quality First entered into a contract with the Army Corps of Engineers for the relocation of a hydraulic steel flood control gate along the Mississippi River. Couvillion then entered into a Subcontract Agreement with Quality First to furnish labor, equipment, and material for installing, dewatering, and watering components of the hydraulic steel structure. There were delays, allegedly caused by the Corps of Engineers, and Couvillion asserted that Couvillion and Quality First agreed to additional work and expenses, which were not paid by Quality First. Quality First objected to any parole evidence between the parties with respect to the additional work on the ground that the Subcontract Agreement required a "written order" from Quality First to modify the work set forth in the Agreement. Judge Vitter first held that the Subcontract Agreement was a maritime contract and maritime law applied to the dispute because the Agreement contemplated the substantial role of a vessel in the completion of the work (applying the recent test enunciated by the Fifth Circuit in B*arrios v. Centaur* that is described in this Update). The parties disagreed on the meaning of the phrase, "written order," with Quality First asserting that there was no written work order and Couvillion contending that emails between the parties constituted the written order in this case. Siding with Couvillion, Judge Vitter held that the language in the Agreement was ambiguous and that documents demonstrating that Quality First had requested modifications of the Agreement would not be excluded as parole evidence.

Testimony of doctor on causation was excluded, and the court granted summary judgment in a Back-End Litigation Option suit against BP arising out of the cleanup from the Macondo/DEEPWATER HORIZON incident. *McGill v. BP Exploration & Production Inc.*, No. 1:18-cv-159, 2019 U.S. Dist. Lexis 198359 (S.D. Miss. Nov. 15, 2019) (Guirola).

Opinion

Blaine McGill was employed in the clean up of oil in the Gulf of Mexico following the blowout of BP's Macondo Well. McGill is a participant in the Medical Benefits Class Action Settlement Agreement that permits members with later-manifested physical conditions to bring suits under the Back-End Litigation Option. Pursuant to this option, McGill was permitted to bring this action without having to establish fault of BP, but he

was required to establish that his later-manifested conditions (pneumonia and acute respiratory failure) were caused by exposure to the oil or dispersants. McGill designated Dr. Steve Stogner as an expert in the field of pulmonology, and Dr. Stogner opined that McGill's exposure to dispersants during the clean-up work probably caused or contributed to McGill's illnesses. However, Dr. Stogner did not know the extent of McGill's exposure, whether his exposure was through inhalation or skin contact, or whether the dispersant could be inhaled after it had been applied to the water. He simply assumed that McGill's illnesses were caused by the exposure because McGill first developed symptoms after completing his clean-up duties. Consequently, his opinions were based on speculation and insufficient facts, and Judge Guirola ruled that they should be excluded. As expert testimony is required to establish causation in toxic tort cases, Judge Guirola dismissed the lawsuit with prejudice.

Arrest of vessel in Maine was transferred to Florida where the dispute arose between residents of Florida. *IK Yacht Design, Inc. v. M/V ALMOST THERE*, No. 2:19-cv-394, 2019 U.S. Dist. Lexis 198565 (D. Me. Nov. 15, 2019) (Walker).

Opinion

This case arises from a contract dispute arising out of work that IK Yacht Design performed on the yacht ALMOST THERE in Florida. Before the dispute could be resolved, the owner of the yacht sailed it to Maine, where IK Yacht arrested the vessel and moved to transfer the case to Florida, where IK Yacht Design is located, where the owner of the yacht is located, where the work was performed, and where the vessel has its home port. Although the owners argued that their choice of forum should be credited, Judge Walker held that the evidence overwhelmingly favored transfer and transferred the case.

Court denied dueling motions to disqualify opposing counsel in seamen's case. *In re Tara Crosby, L.L.C.*, No. 17-5391, 2019 U.S. Dist. Lexis 200250 (E.D. La. Nov. 18, 2019) (Ashe).

Opinion

After the M/V CROSBY COMMANDER sank on May 29, 2017 in the Gulf of Mexico, offshore Louisiana, the owner of the vessel, Tara Crosby, L.L.C., filed this limitation of liability action, and the vessel's master and relief captain filed claims represented by the same counsel. The claimants also brought a third-party complaint against Tetra Technologies. Two years into the litigation, the claimants filed a motion to disqualify counsel for Crosby, Miles P. Clements and Joseph E. Lee, III, and Tetra filed a motion to disqualify counsel for the claimants. The basis for the motion against the claimants was that the same counsel could not represent both parties as their positions were in conflict. Relief Captain Hebert was at the wheel when the vessel became imperiled, and the Master, Pitre, was alleged to have made the decision to insert a "dog" into the towing winch, despite incoming severe weather, in violation of the policy of Crosby. Crediting the testimony of Professor Dane Ciolino, Judge Ashe noted that the claimants had not actually made any claims against each other and did not have to in this Jones Act case. Judge Ashe believed that their interests were not adverse and there was no conflict in their concurrent

representation. Clements and Lee were engaged by Crosby to investigate the sinking prior to the suit at the time that the Coast Guard was investigating the incident. Before claimants were interviewed by the Coast Guard, they spoke to Crosby's counsel and gave them permission to attend the interviews. The Coast Guard required that claimants provided written witness statements regarding the sinking, and Hebert wrote and signed his own statement, and also gave a recorded statement to Lee. Pitre asked Clements to transcribe his statement for him based on his interview, and Pitre then reviewed and signed the statement. Judge Ashe concluded that the claimants did not form an attorney-client relationship with Clements or Lee, and that neither attorney manifested an intent to provide legal services for them. During the Coast Guard investigation, the attorneys represented Crosby and attended the witness interviews as counsel for Crosby, not as attorneys for the claimants. Even the transcribing of the statement did not amount to legal advice or services. Claimants were aware that the attorneys represented Crosby, and that became abundantly clear when they presented settlement offers to the claimants on behalf of Crosby. If there were any conflict, Judge Ashe held that claimants waived the conflict by waiting for two years to raise it.

Court must have jurisdiction over the res in order to make a salvage award. *Odyssey Marine Exploration, Inc. v. Shipwrecked & Abandoned SS Mantola*, No. 17-cv-2924, 2019 U.S. Dist. Lexis 200891 (S.D.N.Y. Nov. 19, 2019) (Engelmayer).

Opinion

After Odyssey located the SS MANTOLA, a British ship that was torpedoed and sunk in the North Atlantic during World War I with a cargo of 536 silver bars, Odyssey brought this action seeking the arrest of the vessel and its cargo. The court ordered the arrest of a silk cloth that was recovered from the wreck, giving the court jurisdiction, and the court entered a preliminary injunction that prevented third parties from interfering with Odyssey's rights to salvage the site of the shipwreck. The United Kingdom Department for Transport moved to dismiss the action on the ground that the silver bars had been recovered the day before the court exercised in rem jurisdiction. As the court did have jurisdiction over the silk cloth that Odyssey removed from the wreck, Judge Engelmayer gave title to the cloth to Odyssey as a salvage award. However, he could not give a salvage award to Odyssey for the silver bars. Judge Engelmayer rejected Odyssey's argument that the court had constructive in rem jurisdiction over the silver bars based on a maritime lien arising when Odyssey first rendered services to the ship and recovered the cloth. The court must have jurisdiction over the res, which requires either actual or constructive possession. Thus, the court may have possession over the entire shipwreck if part of the wreck is before the court. But the court may not exercise jurisdiction before any part of the res is before the court and an in rem action has been initiated.

Vessel negligence and limitation were determined among three vessels in connection with the allision between a vessel and three docks on the Mississippi River; dock worker who fell after allision was denied recovery. *SCF Waxler Marine LLC v. M/V ARIS T*, No. 16-902, c/w Nos. 16-959, 16-1022, 16-1060, 16-1134, and 16-1614, 2019 U.S. Dist. Lexis 205793 (E.D. La. Nov. 19, 2019) (Ashe).

Opinion

The bulk carrier M/V ARIS T struck three marine terminals and some vessels and barges after a passing and overtaking involving the LORETTA G and the ELIZABETH M. ROBINSON. An employee of one of the terminals, Antoine Morris, also brought an action for damages for injuries allegedly sustained as a result of the accident. The vessel owners/operators all filed limitation actions. Judge Ashe tried the negligence and limitation-of-liability actions for ten days and the injury action for three days. In a lengthy detailed opinion, he found the three vessels at fault, assessing 10% of the fault to the ARIS T and 45% each to the other vessels. He upheld limitation for the ARIS T (fund of $8,645,171.42), but denied limitation for Cenac, owner of the LORETTA G, and Genesis, owner of the ELIZABETH M. ROBINSON. Judge Ashe noted that the liability of the non-limiting vessels was joint and several. He then awarded property damages in accordance with the stipulations of the parties. Morris testified that he was standing on the dock when he received a radio communication that a ship had hit a different berth a mile away and warning him to be on the lookout. When he turned quickly he lost his footing and fell. He admitted that he panicked when he saw the distant vessel and tripped on his own feet. It was 3 ½ minutes from the time he tripped until the vessel reached a point abreast of the location where he fell, giving him plenty of time to evacuate. Morris did not report the incident, and a few days later went to see a family practitioner, but he did not report a fall consistent with his trial testimony. After engaging an attorney, Morris saw Dr. Liechty and reported that he was knocked down by the jarring force of the dock being struck by a vessel. He then saw Dr. David Axelrad, a psychiatrist and psychotherapist in Houston and gave an even more dramatic history. Dr. Axelrad diagnosed post-traumatic stress disorder and a traumatic brain injury that affected Morris' ability to function, although he could not explain the mechanics of the injury. Judge Ashe denied any recovery for Morris, concluding that the negligence of the vessels was not a substantial factor in bringing about Morris's alleged physical and mental injuries. Additionally, Judge Ashe held that Morris could not recovery for his alleged emotional injury under the zone of danger theory as he was not in a zone of danger.

Owner recovered charter hire despite damage to charterer's cargo during storm. *Heko Services v. ChemTrack Alaska, Inc.*, No. 2:18-cv-1587, 2019 U.S. Dist. Lexis 200614 (W.D. Wash. Nov. 19, 2019) (Jones).

Opinion

ChemTrack charted a tug and barge from Heko to ship contaminated soil from Naknek, Alaska, to Elliot Bay in Seattle, Washington. ChemTrack agreed to pay a lump sum for charter hire with enumerated inclusions and exclusions. When the tug and barge encountered a storm and some of the soil was washed overboard, the tow was diverted for reloading before proceeding to Elliot's Bay. Heko brought this suit for breach of contract, and ChemTrack counterclaimed alleging breach of contract by Heko. Before getting to the arguments on the alleged breaches, Judge Jones found that there were fact questions as to what caused the soil to shift and go overboard, necessitating the diversion. The first argument addressed by Judge Jones was the right of Heko to recover the lump sum charter hire. ChemTrack argued that it was not provided the entirety of the deck space;

however, that was not a material breach of the charter and did not prevent Heko from recovering the full charter hire in accordance with the terms of the charter. Heko also sought demurrage for additional time in loading, unloading, and in the re-stowage based on the charter allowances of two days for loading before a rate of $750 per hour applied and 3 days to offload the cargo before a rate of $200 per hour applied. However, Judge Jones ruled that, despite the demurrage clause, the penalty could only be claimed if the owner could demonstrate that he suffered actual damage from the charterer's delay. In this case, Heko established the amount of time spent in loading and unloading but did not establish actual damages. Therefore, Heko's motion for summary judgment was denied with respect to demurrage. Heko also sought to recover expenses incurred during the voyage based on the provision that ChemTrack would be responsible for all expenses incurred during the charter related to the vessels except wharfage and dockage in Naknek. Heko submitted a lone invoice for the expenses, but Judge Jones noted that there was other cargo on the barge as well as ChemTrack's soil. Thus, there was an issue of fact as to what expenses were recoverable. Similarly, Heko failed to establish as a matter of law that it was entitled to additional costs of its crew assisting with the cargo handling or with damage to the barge during the offloading in Seattle. Judge Jones denied summary judgment to ChemTrack on its counterclaim that the barge was not configured as represented, that Heko carried cargo for parties other than ChemTrack, and that the barge was not seaworthy as ChemTrack acknowledged that the barge was suitable upon first loading the soil. ChemTrack's claim against Heko for proceeding with the voyage when the weather was unsafe was barred by the provision that ChemTrack was responsible for all loss, damage, expense, and liability applicable to the cargo, regardless of the negligence or fault of the owner.

Navy boiler technician who worked on pump failed to establish asbestos exposure. *In re Asbestos Litigation*, No. 18-410, 2019 U.S. Dist. Lexis 200926 (D. Del. Nov. 20, 2019) (Fallon).

Opinion

Kent Mosher claimed that he developed mesothelioma as a result of exposure to asbestos-containing materials during his service as a boiler technician in the United States Navy. In response to the motion for summary judgment of Air & Liquid, successor to Buffalo Pumps, Mosher argued that he performed maintenance on a pump whose casing identified the pump as a Buffalo pump. He did not have to repack or open the pump, however, nor did he observe others working on the pump. As Mosher could not demonstrate that the pump was equipped with asbestos components, he failed to establish that the defendant's products were a substantial factor in causing his injury, as required by the general maritime law, and Judge Fallon granted Air & Liquid summary judgment.

Carrier's lien on cargo requires actual or constructive possession. *In re Brookstone Holdings Corp.*, No. 18-11780, 2019 Bankr. Lexis 3626 (Bankr. D. Del. Nov. 20, 2019) (Shannon).

Opinion

Yang Ming and Ocean Network asserted secured claims in Brookstone Holdings' bankruptcy based on the provisions in their bills of lading that their liens for unpaid freight survived delivery. The bankruptcy trustee argued that the carriers had delivered the goods and that they did not possess any other goods of Brookstone Holdings. Therefore, the maritime law did not afford a lien, and their claims should be treated as unsecured. Bankruptcy Judge Shannon agreed. As the carriers could not identify any goods in their actual or constructive possession to which maritime liens could attach, Judge Shannon held that their claims would be classified as unsecured.

Seaman ordered to London arbitration in direct action against P&I club brought in Louisiana. *Havard v. Offshore Specialty Fabricators, LLC*, No. 14-824, 2019 U.S. Dist. Lexis 201884 (E.D. La. Nov. 21, 2019) (Feldman).

Opinion

Ronald Havard brought this Jones Act action asserting injuries when a tow cable broke and he fell on defendant's vessel. After the defendant emerged from bankruptcy, the case was set for trial, but on the eve of trial Havard filed an amended complaint under the Louisiana Direct Action Statute against the P&I Club that insured the vessel. The Club moved to stay the litigation and compel arbitration. Judge Feldman reviewed the case law and reasoned that the seaman stood in the shoes of the insured and was bound by the arbitration agreement between the defendant and the Club. Havard did not challenge that conclusion, but he did argue that selection of London in the arbitration clause was unreasonable in view of the fact that he was injured in Louisiana by a Louisiana tortfeasor and the witnesses were local to Louisiana, Texas, and Mississippi. Havard argued that he was financially unable to proceed in England. Judge Feldman pointed out that this is a situation where the seaman is pursuing a London insurer that has designated its home forum for arbitration. It is not a case of two Americans having to travel to a remote forum. Although it may be inconvenient for Havard to arbitrate in London, he cannot embrace a contract when it is favorable to him and repudiate the contract when it works to his detriment. Judge Feldman granted the motion to compel arbitration and stayed the litigation.

Nine prior incidents and presence of a little man with a mop were insufficient to grant summary judgment to the passenger on the cruise line's notice. *Williford v. Carnival Corp.*, No. 17-21992, 2019 U.S. Dist. Lexis 202722 (S.D. Fla. Nov. 22, 2019) (Cooke).

Opinion

After enjoying four drinks in the hours before her fall pursuant to Carnival's "Cheers Program," Diane Williford slipped and fell on a staircase from a deck containing a water park with water features. She moved for summary judgment that the cruise line had notice of the risk of water accumulating on the stairs based on nine similar incidents on three different vessels over the past three years, including one incident in 2014 on the same stairs on which she fell. She also cited the fact that there was a little man with a mop on

the deck and some cones, but she was not sure how close the man and cones were to the stairs. The cruise line argued that the prior incidents were not substantially similar to this case, particularly because they did not involve a passenger who had consumed four drinks before the fall, and that the stairs were inspected minutes after the accident and the area was dry with no apparent safety concerns. After describing the passenger's evidence about the location as "equivocal," Judge Cooke expressed that the prior incidents were more compelling. She was not persuaded that the passenger's participation in the Cheers Program made this fall different from the other incidents. Although the prior incidents were evidence that the cruise line had notice of the risk of a fall, Judge Cooke believed that the evidence was not sufficient to provide notice as a matter of law (particularly when there was a dispute whether the stairs were wet at all). Consequently, she held there were triable issues of fact as to whether the cruise line was on notice of a slippery condition and whether the stairs were slippery.

Florida statute of limitations held to bar claims brought more than five years after completion of services based on unjust enrichment and quantum meruit but not based on breach of contract or promissory estoppel. *Maunlad Transportation, Inc. v. Carnival Corp.*, No. 18-24456, 2019 U.S. Dist. Lexis 206529 (S.D. Fla. Nov. 25, 2019) (Torres).

Opinion

Maunlad entered into an agreement in 1998 with Carnival to recruit Filipino crewmembers for Carnival vessels for a finder's fee and administrative expenses. The parties modified their contract through the years, but the contract required invoicing on a weekly basis. Nonetheless, Maunlad alleged that the parties orally agreed that Maunlad would only invoice Carnival for the finder's fee and not the administrative expenses. Carnival terminated the contract effective in February 2014, but the last services were performed in August 2013. Two years later Maunlad sent a written demand for $1.5 million in administrative expenses that had never been invoiced along with fees for lobbying services it undertook on behalf of Carnival. This suit was then brought in October 2018, more than five years after the last services were brought but less than four years from the date of the demand. Citing the Florida statute of limitations of five years for a suit on a written contract and four years for a suit on an oral contract, Carnival moved to dismiss all of the claims brought by Maunlad. Magistrate Judge Torres recommended that summary judgment on the claims for breach of contract and promissory estoppel (four-year statute of limitations) be denied. Magistrate Judge Torres reasoned that these claims did not accrue until there was a breach, and there was no breach until Carnival denied the demand in 2016. He did not consider the delay of two years from the end of the contract to make the demand for expenses going back for years before that date was unreasonable. With respect to the claims for unjust enrichment and quantum meruit, Magistrate Judge Torres held that the claims accrued when the benefit was conferred, and that was when the services were provided. As that was no later than August 2013, the claims were barred. Judge Torres then held that Maunlad should replead its counts of breach of fiduciary duty and constructive fraud.

Seaman with strep was allowed to pursue his claim for callous failure to pay maintenance while he was hospitalized and for delays and failure to pay full medical expenses when his private insurer and Medicare were paying for his treatment, but his Jones Act claim for failure to provide adequate treatment was denied. *Aadland v. Boat Santa Rita II, Inc.* No. 17-cv-11248, 2019 U.S. Dist. Lexis 203826 (D. Mass. Nov. 25, 2019) (Casper).

Opinion

Magnus Aadland fell ill while serving as the Captain of defendant's F/V LINDA. He was hospitalized for streptococcus, and his treatment was paid first by his wife's health insurance, then by COBRA, and then by Medicare. The defendant paid maintenance at the rate of $84 per day retroactive to Aadland's discharge from the hospital, paid additional amounts as "advances," and then increased his daily rate of maintenance to $114 per day (including periods of subsequent hospitalization). The defendant also reimbursed out-of-pocket medical expenses. Aadland brought this action seeking to recover for Jones Act negligence, unseaworthiness, maintenance and cure, and failure to pay maintenance and cure. Judge Casper granted summary judgment on the claim that the defendant failed to provide prompt and adequate care for him when his insurer refused to pay for treatment at an acute rehabilitation facility and instead funded his stay in a skilled nursing facility and the defendant declined to step in and pay for treatment at the acute rehabilitation facility. Aadland did not elicit any evidence that the treatment at the skilled nursing facility was inadequate and consequently failed to establish that the defendant did not provide reasonable care and did not establish how any failure caused injury to Aadland. Judge Casper denied the defendant's motion for summary judgment on the failure to pay maintenance and cure. With respect to maintenance, the defendant paid maintenance for the entire period after Aadland left the vessel except for his initial hospitalization, and even paid advances and raised the rate to $114 per day. Aadland complained of the failure to pay maintenance during the period in which he was hospitalized. Judge Casper noted language in a case cited by the defendant that the employer is not required to pay maintenance unless "the seaman is outside the hospital and has not reached the point of 'maximum cure.'" Without noting the language from other decisions, Judge Casper concluded that the quoted language was not clear whether the rule applied when there was no showing of maximum cure and the employer itself was not paying for the cure. With respect to cure, Judge Casper cited the partial payments made by the defendant, but she would not rule as a matter of law that they were sufficient to avoid a fact question of callous and willful failure to pay in view of delays in payment and the fact that the defendant had only reimbursed the seaman for his out-of-pocket payments and had not paid the private insurers or Medicare.

Lifecare planner will be allowed to testify about lifetime prescription medication if predicated on testimony of the treating physician. *Bergeron v. Great Lakes Dredge & Dock Co.*, No. 17-2, 2019 U.S. Dist. Lexis 205588 (W.D. La. Nov. 26, 2019) (Morgan).

Opinion

The defendant in this Jones Act case objected to the cost of the medication Trintellix for the remainder of the seaman's life in the lifecare plan submitted by the seaman's expert. The objection was based on lack of foundation because the treating physician did not testify in his deposition about the seaman's lifetime need for Trintellix. In denying the defendant's motion in limine, Judge Morgan noted that the defendant did not ask the doctor about his prescribing Trintellix even though the defendant received the doctor's report recommending the substitution of Trintellix two months before the deposition. Thus, the lifecare planner would be allowed to testify about the cost of the medication if the seaman's physician testified about the medical necessity for the medication.

From the state courts:

Maintenance payments to seaman may not be offset against the seaman's tort recovery even though the seaman received no maintenance on the vessel and the payments were a windfall to the seaman. *Harlan v. Hampton Roads Leasing, Inc.*, No. CL 18-5309, 2019 Va. Cir. Lexis 1159 (Norfolk Cir. Ct. Nov. 13, 2019) (Lannetti).

Opinion

Thomas K. Harlan was injured while serving as a seaman on defendant's tug CAPT WOODY. His employer paid his medical expenses and maintenance of $36,140 (at $65 per day). Harlan brought a Jones Act suit against his employer, and the jury returned a verdict that found the defendant 60% at fault and awarded damages for lost earnings and pain and suffering. His employer then sought a credit against the award for the maintenance payments, arguing that Harlan received no food or lodging on the tug, and his receipt of maintenance payments plus lost wages would be a windfall to the seaman and put him in a better position than he would have been had he not been injured. Judge Lannetti noted that maintenance and cure payments that are duplicative of the award in the Jones Act action may be credited against the award (medical payments for example). However, the maintenance payments for food and lodging on the vessel could not be duplicative of his wage claim because he never received food and lodging on the vessel. Thus, despite the fact that the maintenance payments were a windfall to Harlan, the payments emanated from his employment contract with the defendant and were independent of (and could not reduce) his right to seek tort damages.

Award of $1.8 million against insurer of Wellsure Energy Package related to redrilling and recompleting a well damaged by Hurricane Rita was affirmed, but extracontractual damages for knowing violation of the Texas Insurance Code and statutory interest at 18% per annum under the Texas Prompt Payment Act were reversed. *Certain Underwriters at Lloyd's London v. Prime Natural Resources, Inc.*, No. 01-17-00881-CV (Tex. App.—Houston [1st Dist.] Nov. 26, 2019) (Hightower).

Opinion

This is another insurance dispute over damage to an offshore structure during the tragic 2005 hurricane season. After Hurricane Rita struck, the H-2 Well, owned 50% by Prime

and operated by W&T Offshore, was catastrophically damaged. Underwriters eventually entered into a global settlement with W&T under its policy, but a settlement was not reached between underwriters and Prime under the Wellsure Energy Package Policy issued to Prime. This litigation is the second suit between the parties and involves a dispute over Prime's portion of the costs for redrilling and recompletion of the well. The Houston jury sided with Prime, and the judge awarded the disputed costs of $1,820,180.92, prejudgment interest on the actual damages back to 2006 in the amount of $2,706,104.85, statutory interest at 18% per annum from 2005 under the Texas Prompt Payment Act, amounting to $9,932,726.87, damages for knowing violation of the Texas Insurance Code of $3,640,361.84, and attorney's fees of $1,463,586.46. The court of appeals agreed that the policy benefits were owed, but it reversed the award of damages for violation of the insurance code because the violation was not made knowingly. That standard requires more than just knowing what the person is doing when denying the claim. It requires that the person know the act is false, deceptive, or unfair. The court of appeals did not consider underwriters' arguments to be patently unreasonable and could not say that Prime's demand was such that an ordinarily prudent insurer would have accepted it. The court of appeals also reversed the award of interest under the Prompt Payment Act. The district court awarded interest on the entire claim even though underwriters had made a payment of $2.82 million on its claim of $4.7 million. At the time of the payment, it was unconditional. After litigation ensued, the underwriters pursued a counterclaim for $1.8 million on the ground that they had overpaid Prime in the $2.82 million payment. The court of appeals did not consider the counterclaim to convert the payment to being conditional, as Prime accepted the funds and underwriters were just exercising their right to litigate whether the funds were owed.

Thanks to Monica Markovich for her help in preparing this Update.

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Quote:

The following is the text of an amendment to a bill introduced in the New Mexico state senate by Senator Duncan Scott to mandate that psychiatrists testifying as expert witnesses dress as wizards (S. Floor Amend. 1 to S.B. 459, 42d Leg., 1st Sess. (N.M. 1995):

When a psychologist or psychiatrist testifies during a defendant's competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall. The surface of the hat shall be imprinted with stars and lightning bolts. Additionally,

a psychologist or psychiatrist shall be required to don a white beard that is not less than 18 inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding a defendant's competency, the bailiff shall contemporaneously dim the courtroom lights and administer two strikes to a Chinese gong.

Please note that these opinions and statements are my own analysis of the cases that are discussed. They do not represent the position of Brown Sims, P.C. or any organization to which I belong or that I represent. Under no circumstances should these opinions and statements be considered legal advice. If you want legal advice, please consult an attorney.

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